

## ORC'S BIWEEKLY ENVIRONMENTAL UPDATES

Assembled by Matt Hicks

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### **DEVELOPMENTS WITH NATIONWIDE IMPLICATIONS:**

## **Trump Faults EPA With Release Of Orders Limiting Guidance, Enforcement**

**by: Doug Obey, October 9, 2019, Excerpt/summary provided below. To read the full story, go to:**

<https://insideepa.com/daily-news/trump-faults-epa-release-orders-limiting-guidance-enforcement>

President Donald Trump has issued two executive orders (EOs) to force EPA and other agencies to make guidance documents and other internal policy memos available to the public and bar them from enforcing any policies they have not made publicly known in advance, citing several EPA enforcement efforts as "abuse" of such documents.

At an Oct. 9 White House event, the president announced the "Improved Agency Guidance Documents" EO that requires agencies to put guidance documents "on easily searchable websites," and to seek public input "on the most important guidance they issue," with citizens able to ask agencies to withdraw guidance they believe is flawed.

Trump also touted a new "Transparency and Fairness" EO that prohibits EPA and other agencies from enforcing rules they have not made publicly known in advance, according to a White House press release.

"The order also instructs agencies to offer opinion letters to individuals and businesses who request them, so people who want to comply with the law can learn how," the administration says.

Trump signed the two orders after a press event showcasing several current or former business owners affected by enforcement of environmental or other rules, including the former owner of an oyster farm who said federal regulations drove him out of business.

"No American should ever face such persecution from their own government, except perhaps your president," Trump said in what appeared to be a sarcastic comment [ ]. "Today I am taking action to stop it."

Trump then pivoted back to an explanation of the EOs as his administration's latest solution to onerous government regulation of business.

The pitch was also combined with a broader defense of his deregulatory record likely to be repurposed for the 2020 election campaign, with Trump citing everything from his prior "2-for-1" executive order directing agencies to identify two rules for repeal for every new rule they issue, to pending efforts to loosen efficiency standards for vehicles and lightbulbs, and tax cuts he signed into law prior to the midterm elections.

"With today's EO[s] we continue this incredible economic success," he said.

The White House press release touting the two orders claims President Barack Obama's EPA used non-public guidance documents "to commit horrible abuses against the American people" by threatening enforcement for failure to adhere to policies enacted only through guidance.

For example, the White House says that in 2014 EPA threatened a family with up to \$20 million in Clean Water Act (CWA) fines for building an environmentally-friendly pond for livestock without prior agency approval, "even though Congress had exempted these ponds from EPA's reach."

The administration also says a citizen was imprisoned and ordered to pay \$130,000 after EPA issued a finding that several small ponds he created to fight wildfires were protected "navigable waters" under the CWA.

## 'Fair Notice'

"Going forward, agencies will have to give people fair notice of any complaint against them and a chance to respond," says the White House press release.

In response to the orders, House Judiciary Committee ranking member Doug Collins (R-GA) in an Oct. 9 press release said, "Bureaucratic regulations often blindsides American citizens because agencies refuse to make their guidance public. The resulting government fees often hurt small businesses, farmers and families. The executive orders President Trump signed today will help hardworking Americans by requiring agencies to make their interpretations of statutes public before taking any enforcement measures."

Collins' statement argues that Trump's two orders will prevent agencies from using guidance not available to the public as justification to "threaten" citizens with fines or imprisonment. "When bureaucracy operates in the shadows, it handicaps people trying to do their jobs. President Trump's action helps rein in that bureaucracy," he said.

But the Natural Resources Defense Council's Clean Air, Climate & Clean Energy Program Director John Walke on Twitter accused the White House of "epic hypocrisy."

He noted that the Trump administration is poised to finalize "an illegal EPA guidance document that redefines 'air' so industry can pollute more," a reference to its pending guide that would narrow the definition of "ambient air" for the purposes of air permitting, and that the administration itself has relied on numerous guidance document to implement a deregulatory agenda.

Walke tells *Inside EPA* that the agency has not updated its own list of guidance documents maintained by prior administrations, which would appear to be starkly at odds with Trump's orders.

## EPA, states continue squabbling over 'good neighbor' ruling

by: Sean Reilly, October 9, 2019, *Excerpt/summary provided below. To read the full story, go to:*

<https://www.eenews.net/greenwire/2019/10/09/stories/1061233335>

A fight over EPA's "good neighbor" policy continues to foster bad blood between the federal agency and Northeastern states.

In the latest skirmish in a broader feud, the two sides are sparring over the consequences of the U.S. Court of Appeals for the District of Columbia Circuit's decision last week to junk EPA's blueprint for meeting good neighbor obligations for its 2008 ground-level ozone standard.

Court filings in recent days suggest that a resolution remains far off.

The blueprint, dubbed a "closeout," relied on the Obama-era Cross-State Air Pollution Rule (CSAPR) update in determining that no further limits were needed on smog-forming power plant emissions that might hamper downwind states' ability to meet the 75-parts-per-billion standard. In the Oct. 1 ruling, the D.C. Circuit threw out the closeout, saying that it didn't do enough to cut those emissions by 2021, the next statutory attainment deadline for compliance with the threshold (*Greenwire*, Oct. 2).

The ruling "confirms EPA's inability to rely on the adequacy of any aspect of the emissions trading system" created by the CSAPR update, the attorneys general for Maryland and Delaware wrote in a filing yesterday. The two states are challenging EPA's rejection of their respective bids for a crackdown on coal-fired power plant emissions in as many as five upwind states (*E&E News PM*, April 1). Also signing the filing were the attorneys general for New York and New Jersey, as well as more than a half-dozen environmental groups.

But in its own submission last week, EPA said the ruling "should have little bearing on the validity" of the agency's denial of the petitions from Maryland and Delaware. For one thing, it's up to states to prove that upwind violations are occurring, and they "did not meet their burdens here," an attorney for the agency wrote. For another, the court's decision confirmed EPA's freedom to consider the amount of upwind states' emissions and the cost of reducing them, the attorney wrote. "This

supports EPA's determination here that the states sought no cost-effective controls beyond those already imposed," she added.

Ozone, a lung irritant that is the main ingredient in smog, is formed by the reaction of nitrogen oxides (NOx) and volatile organic compounds in sunlight. Coal-fired power plants are a prime source of NOx; in their petitions, Maryland and Delaware alleged that emissions from plants in the upwind states were undermining their ability to meet the 2008 ozone standard, thus violating the Clean Air Act's good neighbor language.

EPA, however, maintained that no further action was needed because its air quality modeling showed that Eastern states will all meet the standard by 2023 with the help of the emissions cuts required by the CSAPR update.

The Oct. 1 decision by a three-judge panel on the D.C. Circuit followed a ruling last month by a separate panel on the same court that largely upheld the CSAPR update, published in 2016. The ruling found, however, that EPA's reliance on the update to meet good neighbor obligations was "inconsistent" with the Clean Air Act because of the disconnect with the 2021 attainment deadline (*Greenwire*, Sept. 13).

In 2015, EPA tightened the ozone standard to 70 ppb; enforcement of that threshold is in its early stages.

## **EPA Proposes Slew Of Changes To Lead And Copper Rule Requirements**

**by: Lara Beaven, October 10, 2019, *Excerpt/summary provided below. To read the full story, go to:***

**<https://insideepa.com/daily-news/epa-proposes-slew-changes-lead-and-copper-rule-requirements>**

EPA is proposing a slew of changes to its Safe Drinking Water Act lead and copper rule (LCR) that it says are intended to target the reduction of lead in drinking water in communities most at risk, including a first-time sampling requirement for schools and revisions to other sampling requirements, as well as increased treatment and oversight.

The proposal released Oct. 10 "will ensure we are on the cutting edge of public health protection," EPA Administrator Andrew Wheeler said at a signing ceremony in Green Bay, WI, that was livestreamed on the agency's website.

EPA water chief David Ross said at the event that the proposal is based on "exhaustive public outreach." While the proposed rule notes that it includes recommendations from agency advisors and state drinking water regulators, environmentalists are criticizing the proposal, saying it will slow down the replacement of lead service lines (LSLs) compared to current requirements.

Once the agency publishes the proposed rule in the *Federal Register*, it will take public comment on it for 60 days. Wheeler said the agency expects to finalize the rule some time next summer.

Both Ross and Wheeler encouraged filing of comments to help the agency refine the rule, with Ross saying "there is still a significant amount of work to get done" before it is finalized.

The proposed rule focuses on six areas: identifying areas most impacted, strengthening treatment requirements, replacing LSLs, increasing sampling reliability, improving risk communication, and protection of children in schools, according to a summary of the rule. The agency has also released a chart that outlines key differences between the proposal and the existing rule, which was issued in 1991 and has had only a few minor revisions since then.

"The current structure of the rule compels additional protective actions on the part of a water system only after a potential problem has been identified (i.e., the lead action level is exceeded), which may result in periods where the public is exposed to elevated levels of lead while the system evaluates and implements the actions required," the proposed rule's preamble says.

To counter this, EPA is proposing several changes, including requiring water systems to conduct LSL inventories “because the Agency believes that better information regarding the number and locations of lead service lines is critical to a water system’s ability to inform the public about the potential risks of lead in drinking water and to assure reductions in drinking water lead exposure.”

“Given that LSLs are the greatest contributor of lead in drinking water, identifying the locations and, where necessary, removing this source of lead from drinking water, is a critical component of this proposed rule,” EPA says.

Under the current rule, water systems are only required to identify construction materials to locate the requisite number of sampling sites. This has led to uncertainty regarding local and national estimates of locations and numbers of LSL, which range from 6.3 million to 9.3 million, EPA says. That uncertainty creates compliance challenges for water systems that exceed the lead action level of 15 micrograms per liter (ug/L) even after installing corrosion control treatment (CCT).

“Lack of an LSL inventory also results in a lost opportunity to improve the cost efficiency of [LSL replacement (LSLR)] by conducting replacements in tandem with main replacement activities or in neighborhoods where LSLs are most prevalent, or in accordance to policy goals, such as prioritizing LSLR at schools, childcare facilities, and homes with children,” the proposed rule says.

### **Funding Options**

EPA is targeting funding and financing programs, including grant programs, to reduce lead exposure through infrastructure projects that include full LSLR, and water systems that have prepared an LSL inventory will be better able to demonstrate their priority for infrastructure financing assistance, the proposal says.

It notes that the proposed LSL inventory requirements are consistent with a recent white paper from the Association of State Drinking Water Administrators (ASDWA).

The proposal’s approach to LSLRs is attracting some of the most criticism from environmentalists, who take issue with the proposed reduction of replacements from 7 percent of LSLs annually to 3 percent.

But EPA officials say that when the proposed rule’s provisions are taken together, they will lead to an overall reduction in lead exposure that is much greater than the current approach.

Wheeler said the 3 percent replacement rate is actually more aggressive than the current 7 percent rate because it does not include any offramps to end replacement as the current rule does.

The current rule requires water systems with optimized CCT to replace 7 percent of LSLs annually after exceeding the lead action level. But “the current rule allows for water systems to meet the requirement without conducting any full LSLRs because a water system can count an LSL as replaced if the service line is ‘tested out’ or partially replaced. LSLs are ‘tested out’ when sampling shows lead concentrations at or below 15 ug/L throughout the entire profile of the service line,” the proposal says.

Additionally, because many communities split ownership of the service line between the water system and the customer, this can result in a partial LSLR being conducted when the customer does not agree to have his or her portion removed. “Test outs” and partial LSLR both count as replacements under the current rule, but neither are as effective at reducing lead in drinking water as full LSLR, the proposal says.

The proposed rule generally prohibits partial LSLRs and removes “test outs” from counting toward the LSLR rate. EPA’s Science Advisory Board has concluded that partial LSLRs do not reliably reduce lead levels in drinking water, and the agency’s National Drinking Water Advisory Council in 2015 strongly encouraged drinking water utilities to conduct full LSLRs.

Another proposed change is creating a “trigger level” of 10 ug/L that would require utilities to take additional treatment steps before they reach the action level of 15 ug/L, which the agency is proposing to leave unchanged because agency officials say it is based on feasibility rather than health protection.

The concept of including additional thresholds to compel actions before an action level exceedance was suggested by ASDWA during the federalism consultation process, and this regulatory framework is similar to other national primary drinking water regulations, such as the Long-Term 2 Enhanced Surface Water Treatment Rule, which requires increasing levels of remedial action based on the concentration of the contaminant, the proposal says.

Based on sampling results, systems with elevated lead levels will reevaluate their CCT or conduct a treatment study so that they are prepared to respond quickly when necessary, the agency says. This would be a change from current requirements that are based primarily on the size of the system and do not require re-optimization unless directed to do so by the state and only require a CCT study when the action level is exceeded.

Additionally, the proposed rule would remove calcium carbonate stabilization as a potential CCT technique and thus calcium as a regulated water quality parameter. "The EPA is proposing to eliminate the option of calcium carbonate stabilization as a CCT because literature indicates that calcium carbonate does not form a film on lead and copper pipes to a level that makes it effective as a CCT option," the proposed rule says.

### Sampling Procedures

EPA is also proposing changes to tap sampling procedures by requiring all sampling from taps served by LSLs, rather than the current rule's requirement of 50 percent, and changing the way samples are collected. For example, wide-mouth bottles would be required for collection and running the tap before collecting the sample or removing faucet aerators before sampling would be prohibited.

These changes will better reflect real world conditions, Ross said.

The current rule does not require sampling at schools and childcare facilities, although EPA recently updated an memorandum of understanding that encourages testing at such locations.

But the proposed rule would require water utilities to sample at 20 percent of schools and childcare facilities annually, an EPA official told reporters Oct. 10.

The proposal says water systems "would be expected to complete sampling at all schools and child care facilities in its distribution system every five years. The samples would be first draw after at least 8 hours but not more than 18 hours stagnation of the building and be 250 [milliliters] in volume. The EPA is proposing this sampling protocol to be consistent with recommended sampling protocols under the EPA's 3Ts for Reducing Lead in Drinking Water Toolkit."

Other proposed changes in the rule would require water systems to notify customers of an action level exceedance within 24 hours, make the LSL inventory publicly available and conduct regular outreach to homeowners with LSLs.

## EPA's Regional Shakeup Could Mean More Enforcement, Official Says

by: Stephen Lee, October 10, 2019, *Excerpt/summary provided below. To read the full story, go to:*

<https://news.bloombergenvironment.com/environment-and-energy/epas-regional-shakeup-could-mean-more-enforcement-official-says?context=search&index=19>

- Newly enacted realignment could produce more enforcement activity, head of Civil Enforcement says
- Narrative cuts against critiques that realignment plan will reduce enforcement

The EPA could soon ramp up its enforcement activities under its new regional realignment plan, an agency official said Oct. 10.

The onset of fiscal 2020, which began Oct. 1, marks the first full fiscal year with the plan in place. Under the realignment, each of the 10 regional offices now has its own enforcement and compliance assurance division.

"You may see more activity as a result of that," said Rosemarie Kelley, director of the Environmental Protection Agency's Office of Civil Enforcement.

The uptick in enforcement and compliance monitoring likely will center on the agency's seven priority areas, which include reducing air pollution from stationary sources and hazardous waste facilities, reducing noncompliance with drinking water standards at community water systems, and stopping aftermarket defeat devices for vehicles, Kelley said during a roundtable convened by the American Bar Association.

The EPA is "asking regions to invest significantly" in enforcement in those areas, Kelley said.

### **Less Enforcement?**

Some critics have argued that the reorganization actually will lead to less enforcement, in part by reducing staff. Others have said the plan will undermine regions' enforcement by exposing them to political interference.

Under the new plan, regional enforcement directors will have to report to a politically appointed regional administrator, who then reports to headquarters, the American Federation of Government Employees said in an April 29 letter to Wheeler.

The reorganization lines up with guidance the EPA issued in July that seeks to limit duplication in enforcement and inspection efforts between headquarters and the regions.

Kelley also said the EPA is working to speed up its enforcement actions, with a goal of completing 70% of its inspections within 60 days of their initiation and issuing final reports to the alleged offender within 70 days.

### **More Transparency**

At the same roundtable, the EPA's former top cop warned companies that the agency has gotten much better at quickly fetching companies' environmental compliance reports.

As a result, "what goes on behind the fenceline is simply not going to stay behind the fenceline," said Doug Parker, who headed the EPA's Criminal Investigation Division during the Obama administration.

At the same time, the barriers that used to separate one agency from another have come down, enabling the EPA's enforcers to compare information.

By comparison, 15 years ago, the only way the EPA might learn about corporate wrongdoing uncovered by another agency, such as the Occupational Safety and Health Administration, would be if employees were to "meet up and catch up at a conference," said Parker, now president of environmental consulting firm Earth & Water Strategies LLC.

During the Obama administration, many agencies held the view that companies that violated one type of law, such as labor standards, were also likely to be violating other types of law, such as environmental protection.

Environmental groups are also playing a bigger role in exposing corporate malfeasance, "grabbing data themselves and trying to expose alleged non-compliance," said Parker.